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No. 88-721

In The

Supreme Court of the United States

October Term, 1988

PATSY CAROLYN POE

Petitioner,

v.

DONNIE HAYDON, ROBERT S. SMITHER, JOHN S. SPICER, LOWELL CLARK, JAMES E. STEWART, TONY MILLER AND VENTRA HAMMOND

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether a §1983 Plaintiff by merely alleging a constitutional violation implicating unconstitutional motive without producing any evidence of unconstitutional motive may defeat a Defendant's motion for summary judgment based on qualified immunity and subject the Defendant to the burdens of trial.

II. Whether a §1983 Plaintiff has the burden of producing evidence sufficient to create a genuine issue of fact as to whether the Defendant acted unconstitutionally when the Defendant moves for summary judgment based on qualified immunity.

III. Whether §1983 Defendants are required to plead qualified immunity with specificity when their pleading generally has put the Plaintiff on notice of the defense.

IV. Whether §1983 Defendants have the right to amend their answer and raise the qualified immunity defense after discovery has occurred.

V. Whether a §1983 Plaintiff must present direct evidence of unconstitutional motive when unconstitutional motive is an element of the Plaintiff's claim, in order to defeat a motion for summary judgment based on qualified immunity.

VI. Whether supervisory officials who did not actively participate in or authorize constitutional violations are personally liable for alleged constitutional violations by an employee in a §1983 action.

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COUNTERSTATEMENT OF THE CASE

Toward late November or early December 1984, Petitioner, employed by the Commonwealth of Kentucky as a night shift janitor in the Capitol Building, asked Respondent, Building Superintendent, Don Haydon, for a day shift position in the Capitol. When Haydon explained that such a transfer was not possible, Petitioner commented that she didn't like being the only female employee on the night janitorial shift [R. 18, Haydon Depo. 11]. Haydon had never known of any problems with sexual harassment in the building. He inquired generally of Petitioner as to whether anyone was giving her a problem. She responded in the negative [R. 18, Haydon Depo. 11]. The following day, however, Petitioner changed her story and hinted to Haydon that someone was "bothering" her. At that time, Petitioner affirmatively refused to identify anyone, indicating she did not want to get someone in trouble [R. 10, Poe Depo. 22; R. 18, Haydon Depo. 11-13]. Petitioner rejected Haydon's offers to try to correct the situation [R. 10, Poe Depo. 20-21; R. 18, Haydon Depo. 12-13].

Within a few days of her conversation with Haydon, on December 10, 1984, Petitioner underwent a change of heart about publicizing the accusations. She presented a letter to Haydon's supervisor, Respondent, Robert Smither, Branch Manager, Building Services, accusing her foreman, J.L. Henderson, of sexual harassment [R. 10, Ex. 1 to Poe Depo.]. At the same time, she disseminated copies of the December 10 letter to some of the Respondents and to three other senior executives in State Government, whom she also named as Defendants. Subsequently, these persons were dismissed from this

case. The general allegations in the letter were that Henderson followed her around, watched her and, on one occasion, suggested that they have an affair. The most serious allegation was that Henderson "grabbed, held me down which caused a bruise on my right arm and he kissed me."[1]

Upon receipt of the December 10 letter, immediate action was taken by certain of Respondents. Before Petitioner started her next work shift, Respondent John Spicer, Director, Division of Physical Plant, conducted a meeting with Henderson, Haydon and Smither to determine the facts [R. 18, Haydon Depo. 21; R. 21, Spicer Depo. 5; R. 12, Smither Depo. 16-17]. Henderson denied all of the allegations categorically. Nevertheless, these managers advised him that if any form of sexual harassment was occurring, it would not be tolerated. [R. 18, Haydon Depo. 21, 82; R. 17, Ex. 3 to Hammond Depo.]. This admonishment took place on the day of first actual notice of Petitioner's charges against Henderson. By Petitioner's own admission, Henderson has not bothered her since.

On the same day, Smither and Haydon met with Petitioner and attempted to achieve some expedient resolution of the dispute between Petitioner and Henderson. After advising Petitioner that there were no openings on the day shift in the Capitol, Smither gave Petitioner the

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[1] Petitioner now characterizes this alleged incident as an attempted rape, but in her Complaint she claimed she was subject to an assault, battery, and false imprisonment [R. 1, Complaint]. In any event, no state civil or state criminal charges have been pursued by the Petitioner.

option of a move across the street to the Capitol Annex[2] or the placement of two other janitors she trusted to work with her, thus eliminating any possibility of further harassment or dispute over what was in fact happening [R. 18, Haydon Depo. 30, 31; R. 10, Poe Depo. 29-30; R. 21, Spicer Depo. 18; R. 12, Smither Depo. 19-23, 32]. She chose the latter [R. 18, Haydon Depo. 31, 67-68; R. 21, Spicer Depo. 18; R. 12, Smither Depo. 23]. Division Director Spicer, who had suggested this arrangement, believed it would protect both parties during the pendency of any further investigation into the matter [R. 21, Spicer Depo. 18, 22]. Spicer was Smither's immediate supervisor who, in the line of supervision, was Haydon's superior.

Respondent, Paul A. ("Tony") Miller, Jr., Commissioner of the Department for Facilities and Management (Spicer's superior) had formally asked Spicer to look into the matter and, on December 13, Miller received a report from Spicer that a workable solution had been found [R. 13, Miller Depo. 5; R. 17, Ex. 3 to Hammond Depo.].

Respondent, Ventra Hammond, Executive Director of the Office of Equal Employment Opportunity and Contract Compliance in Finance and Administration, a staff adjunct of the Cabinet Secretary's office, initiated her own inquiry at the request of the Secretary. A copy of the December 10 letter had been routed to the Secretary, who was originally named as a Defendant [R. 17, Hammond

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[2] Petitioner admits that there is no difference in pay in the two jobs, but believes "the people in the Capitol are a lot cleaner than the people in the Capitol Annex" [R. 10, Poe Depo. 37].

Depo. 4]. Hammond met twice with Poe and once with Henderson during the week of December 18, 1984. Henderson again denied the allegations [R. 17, Hammond Depo. 18].

Based on these interviews and a copy of Spicer's December 13, 1984, memo to Miller [R. 17, Ex. 3 to Hammond Depo.], Hammond advised the Secretary of the Cabinet of what she had learned and her determination that the dispute, at base, was one person's word against another's [R. 17, Hammond Depo. 24, Ex. 6 to Hammond Depo.].

Hammond asked Spicer to investigate further by contacting the persons whom Petitioner said were witnesses. Spicer delegated this responsibility to Haydon who obtained statements from two fellow janitors, and a security guard on the night shift in the Capitol, all of whom were persons Petitioner had named as witnesses [R. 21, Spicer Depo. 28; R. 12, Smither Depo. 28-29; R. 18, Haydon Depo. 25-29; R. 17, Hammond Depo. 26-28, Ex. 5 to Hammond Depo.]. Spicer then transmitted the statements to Hammond [R. 17, Hammond Depo. 30]. These statements were not specifically supportive of Petitioner's charges. None of the individuals had witnessed the purported sexual assault cited in Petitioner's letter of December 10 or any other incident that could unmistakenly be deemed sexual harassment[3] [R. 18, Haydon

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[3] The security guard who saw Henderson starting to enter a restroom in which Petitioner was working had no knowledge that Henderson was aware that Petitioner was in the restroom [R. 25, Tracy Depo. 46-50]. Petitioner did not even mention this

(Continued on following page)

Depo. 80-81]. Obviously, there was a significant credibility conflict, but no judgment was made about who was telling the truth. Since the investigation proved inconclusive, no action was taken against Henderson [R. 10, Ex. 3 to Poe Depo.].

Petitioner positively acknowledges that there was not a recurrence of harassment after she reported her allegations in the December 10 letter [R. 1, Poe Depo. 72]. Moreover, she made no further complaints and did not at the time claim or indicate, orally or in writing, that she was unhappy or upset with the new work crew arrangement. However, without any advance notice to her supervisor of her intention to do so, on December 20, 1984, she took a leave of absence [R. 10, Ex. 2 to Poe Depo.; R. 12, Smither Depo. 29-30].

Respondent, James Stewart, Executive Director of Office of Management Services in Finance and Administration, was not aware of any allegations until February, 1985, when Spicer contacted him for advice concerning the fact that Petitioner's leave of absence had expired [R. 14, Stewart Depo. 5].

Stewart's review of the investigation convinced him that it was not appropriate to dismiss Petitioner for job abandonment [R. 14, Stewart Depo. 10-11]. Therefore, he wrote Petitioner a letter on February 20, 1985, which gave

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alleged incident in her December 10 letter and it was not mentioned in the witness contacts directed by Hammond. Respondents learned about this allegation only after they received Petitioner's March 28, 1985 EEOC charge.

her several options and reiterated the offer of a transfer to the day shift in the Capitol Annex [R. 10, Ex. 3 to Poe Depo.; R. 14, Stewart Depo. 10]. Petitioner responded on February 25 that she wanted her old job back in the Capitol [R. 10, Ex. 4 to Poe Depo.].

On March 1, 1985, Petitioner returned to work accompanied by an attorney. Since a day shift position in the Capitol was not available, the Capitol Annex position again was offered to Petitioner; she again rejected it [R. 10, Poe Depo. 43]. Because Petitioner and her attorney were adamant about her preference, Stewart made the decision to return Petitioner to her old job in the Capitol on the night shift[4] [R. 18, Haydon Depo. 79; R. 14, Stewart Depo. 14].

Subsequently, on March 28, 1985, Petitioner filed her first charge with the Equal Employment Opportunity Commission. The charge clearly alleged that sexual harassment was continuing [R. 10, Ex. 5 to Poe Depo.].

Based on Petitioner's charge, Haydon and others mistakenly believed that Petitioner was still having problems with Henderson [R. 10, Poe Depo. 71; R. 18, Haydon Depo. 46, 80]. Therefore, Haydon strongly urged, and eventually Smither decided, that Petitioner should be reassigned to the Capitol Annex on the night shift at no loss in pay or benefits [R. 12, Smither Depo. 47; R. 17, Ex. 7 to Hammond Depo.].

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[4] Petitioner worked alone when she returned. Thus the experiment with the three-person crew to which she objects lasted for only 8 work days in December, 1984.

On May 13, 1985, Miller again became involved when Petitioner came to his office complaining of the harassment by Henderson in November and December, 1984. She brought with her statements that she alleged were EEOC Affidavits [R. 10, Poe Depo. 48; R. 13, Miller Depo. 3, 4; R. 24, Ex. 1 to Clark Depo.]. Miller again took action immediately to have Respondent, Lowell Clark, who had succeeded Stewart in the position of Executive Director, Office of Management Services, look into the matter and check out Petitioner's witnesses [R. 13, Miller Depo. 4, 8, 9]. This was the first time Clark had heard of the case. Clark immediately met with and individually interviewed Petitioner and three of her witnesses [R. 24, Clark Depo. 8-9, 13, Ex. 2 to Clark Depo.].

Clark concluded that there still was no direct or convincing circumstantial proof of the allegations. Even one of Petitioner's principal witnesses indicated to Clark that he assumed the contacts he observed between Henderson and Petitioner were in a joking spirit [R. 24, Clark Depo. 18].

Clark found no reason to question the earlier investigation conducted by Hammond [R. 24, Clark Depo. 31-34]. Nevertheless, when Clark learned that Petitioner had written a letter on May 10 to the Attorney General of Kentucky, in which she again implied that the harassment was continuing [R. 13, Ex. 2 and Ex. 3 to Miller Depo.], he consulted with counsel for the Cabinet. Based on the earlier interviews and on the fact that Petitioner already had been moved to the adjoining Capitol Annex, where she could no longer have contact with Henderson, Clark determined that no change in Petitioner's assignment

should be made pending the EEOC investigation [R. 24, Clark Depo. 19].

Petitioner was transferred to and worked in the Capitol Annex on the night shift from May 13, 1985 until May 21, 1985, when she took another leave without pay. This leave lasted until June 7, 1985. During the leave of absence, Petitioner wrote a letter to Clark requesting a day shift assignment in the Capitol Annex when she returned to work [R. 10, Poe Depo. 46-47]. Since there were positions open there, management immediately granted Petitioner's request and she began this job on June 10, 1985.

On May 31, 1985, however, Petitioner filed a charge of retaliation with the EEOC alleging that her transfer to the night shift in the Capitol Annex on May 13 was in retaliation for the previous sex discrimination charge she had filed with the EEOC [R. 49, Motion to Reconsider, Attachment 2]. Petitioner subsequently abandoned both charges under Title VII of the Civil Rights Act of 1964 to pursue claims under 42 U.S.C. § 1983. However, no dispute now remains that since December 10, 1984, there have been no further incidents of alleged sexual harassment of Petitioner [R. 10, Poe Depo. 72].

On December 3, 1985, Petitioner commenced this action against Respondents as well as Henderson and several other employees of State Government.[5] Petitioner

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[5] Henderson subsequently resigned his position with the State and was not a party to the appeal. Petitioner voluntarily dismissed other Defendants after discovery.

claimed generally that Respondents denied her equal protection and due process of law contrary to the Fourteenth Amendment of the U.S. Constitution and sought $1,500,000 in damages against each Respondent under 42 U.S.C. § 1983. The thrust of Petitioner's theory was that the form and manner in which Respondents responded to her allegations of sexual harassment were constitutionally deficient.

At the conclusion of discovery, during which all the Defendants were deposed by Petitioner's counsel, Defendants moved for summary judgment on the merits and on the basis of qualified immunity. The District Court denied the Motion for Summary Judgment [R. 48, Order]. The District Court also denied Defendants' Motion to Reconsider, ruling that Defendants "may have violated the plaintiff's clearly established rights and hence are not qualifiedly immune" [R. 71, Order p.1].

Respondents filed an interlocutory appeal on the issue of qualified immunity in the Sixth Circuit Court of Appeals. The Court of Appeals vacated the denial of summary judgment and remanded for further proceedings, holding that the District Court did not properly address the issue of qualified immunity. *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Sixth Circuit is entirely consistent with applicable decisions of the Supreme Court. This Court has held that § 1983

defendants are entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendants committed unconstitutional acts. *Mitchell v. Forsyth,* 472 U.S. 511 (1985). The Court of Appeals held that on remand the District Court must determine whether there is a genuine issue as to whether Respondents' conduct violated clearly established constitutional rights of equal protection and due process. Since, in context, Respondents' actions were otherwise objectively reasonable, the Court of Appeals correctly concluded that the motivation for the actions is crucial in determining whether the actions were unconstitutional. Therefore, the Court of Appeals held that Petitioner must produce direct evidence of unconstitutional motive in order to show a genuine issue of material fact requiring trial. Consistent with *Mitchell, supra,* and other decisions of the Supreme Court and other Courts of Appeals, the Sixth Circuit Court of Appeals properly remanded the action for this determination.

ARGUMENT:

REASONS WHY WRIT SHOULD NOT BE GRANTED

I. FEDERAL COURTS OF APPEALS HAVE CONSISTENTLY HELD, IN CONFORMITY WITH DECISIONS OF THE SUPREME COURT, THAT A § 1983 PLAINTIFF ALLEGING A CONSTITUTIONAL VIOLATION IMPLICATING UNCONSTITUTIONAL MOTIVE MUST PRODUCE EVIDENCE OF UNCONSTITUTIONAL MOTIVE IN ORDER TO DEFEAT A DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY.

This Court has consistently held that state officials are entitled to some form of personal immunity from

damage awards in a § 1983 suit. *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Petitioner has cited no decision of the Supreme Court which suggests that the immunity defense is not available in all § 1983 actions.

Traditionally, qualified immunity was defeated only if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . ." *Wood, supra*, at 322. *See also Procunier v. Navarette*, 434 U.S. 555 (1978).

More recently, however, the Supreme Court has recognized that the subjective component of the *Wood* test, which related to permissible intentions, invariably created an issue of fact requiring resolution by the jury. As a result, the purpose of immunity, "that insubstantial claims should not proceed to trial" was defeated. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Therefore, the Supreme Court deleted from its standard the subjective component.

> [B]are allegations of malice should not suffice to subject government officials either to the cost of trial or to the burden of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 817-18. The immunity defense now turns primarily on the question of the objective reasonableness of an

official's conduct, as measured by reference to clearly established law. Petitioner has failed to identify any subsequent decision of the Supreme Court which holds that *Harlow's* adoption of the objective standard eliminates the immunity defense in a § 1983 action when a plaintiff's claim requires proof of unconstitutional motive, as in a claimed equal protection violation.

Since *Harlow*, the Circuits which have considered the immunity defense in the context of a § 1983 action involving an unconstitutional motive have consistently held that bare allegations of unconstitutional motive do not suffice to circumvent *Harlow* and to deprive defendants of the defense of qualified immunity.

> We recognize that in some instances, plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent. Accordingly, in cases involving a claim that defendants acted with an unconstitutional motive, we will require that nonconclusory allegations of evidence of such intent must be present in a complaint for litigants to proceed to discovery on the claim. The allegations on this issue may not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds.

Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied sub nom. Brennan v. Hobson*, 470 U.S. 1084 (1985).

As *Hobson, supra,* recognized, this rule is consistent with the general rule of all Circuits requiring particularity in pleading for civil rights complaints.

> We simply remind our trial courts that some factual allegations must support claims of unconstitutional motives. Plaintiffs who fail to allege any specific facts to support the claim of unconstitutional motive cannot expect to involve Government actors in protracted discovery and trial. On receipt of such a complaint, Government defendants might move for dismissal or, alternatively, for summary judgment. Then plaintiffs must produce some factual support for their claim to avert dismissal.

Hobson, supra, at 30.

In *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425 (D.C. Cir. 1987), the District of Columbia Circuit further elaborated upon the principles it set forth in *Hobson*. In *Martin*, the plaintiff, who had been convicted of unlawful entry, alleged that defendants were animated by the improper motive of covering up their beating of him when they decided to pursue his arrest and indictment. The court first pointed out that absent unconstitutional motive for the plaintiff's arrest and prosecution, the defendants' conduct was within the general ambit of law enforcement duties, was objectively reasonable and was not violative of any clearly established law. The court therefore concluded that a restrictive interpretation of *Harlow*, which foreclosed any inquiry into an official's subjective motivation, would unfairly deprive a plaintiff of a remedy in all cases in which the official's state of mind is an essential component of the alleged constitutional violation. As in *Hobson*, however,

the court emphasized that unsupported claims of unconstitutional motive are not enough.

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegations of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

Id. at 1435. Thus, the District of Columbia Circuit has clearly held that a plaintiff is not entitled to go to trial simply because his claim implicates the defendant's subjective state of mind.

Gutierrez v. Municipal Court of S.E. Judicial District, 838 F.2d 1031 (9th Cir. 1988), cited by Petitioner, is not to the contrary. Petitioner's selective quotation misrepresents the actual holding in *Gutierrez*, where the Ninth Circuit cited extensively from *Hobson* and *Martin*.

> We hold, along with the District of Columbia Circuit, that where the lawfulness of a challenged act is dependent upon the actor's motive or intent, the purpose for which the act was undertaken must be analyzed and not just the act itself. We also hold that in deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element, the court must consider the actor's intent in carrying out the act that is alleged to have resulted in the violation of the plaintiff's rights.

Gutierrez, supra, at 1051. Rather than denying the defense of qualified immunity in equal protection actions, the court simply emphasized that it is the plaintiff's burden

to establish intentional discrimination, and only if he does so is the defense not available.

Because the plaintiff in *Gutierrez* also had Title VII claims, he was entitled to discovery. The court indicated, however, that it approved the District of Columbia Circuit's position that a § 1983 plaintiff also might be entitled to limited discovery when a defendant makes a motion for summary judgment based on qualified immunity.

Petitioner also misconstrued the rule in the Eighth Circuit, when she cited *Goodwin v. Circuit Court of St. Louis County, Missouri*, 729 F.2d 541 (8th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985), for the proposition that qualified immunity is not a defense in cases involving intentional discrimination. In *Goodwin*, the defendant asserted qualified immunity as a defense to damages only *after* a jury found that the defendant had intentionally discriminated on the basis of sex. In such a situation it is obvious why the defense is precluded. That situation does not exist here.

In a more recent § 1983 case involving unconstitutional motive, the Eighth Circuit reversed a denial of summary judgment on the issue of qualified immunity. In *Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986), the plaintiff alleged that the defendant retaliated against him for exercise of his First Amendment rights by initiating an investigation that led to plaintiff's losing his job. The court recognized that the right to be free of official retaliation for the exercise of

First Amendment rights was clearly established. However, the defendant's motivation was crucial to the existence of the constitutional claim. Without an impermissible motive to retaliate, the defendant did nothing more than perform his duty of reporting suspected violations of the law. The court concluded that, in response to defendant's motion for summary judgment, the plaintiff had produced no evidence that defendant's motivation was unconstitutional and therefore, there was no genuine issue, triable to a jury, of improper motivation.

The Court of Appeals Opinion in the present case is entirely consistent with the decisions of other Circuits on this question. The Court cited those decisions and agreed with them that "a government official's motive or intent in carrying out challenged conduct must be considered in the qualified immunity analysis, where unlawful motive or intent is a critical element of the substantive claim." *Poe v. Haydon*, 853 F.2d 418, 431 (6th Cir. 1988).

Respondents' decisions to assign the Petitioner to work with two other janitors and to transfer her to the Capitol Annex were objectively reasonable, and, "[w]ithout an intent to discriminate on the basis of sex . . . reflected at most an attempt at a temporary resolution of an ambiguous situation" *Poe, supra*, at 432. In view of this fact, the Sixth Circuit properly ruled that Petitioner must present direct evidence that the Respondents' actions were motivated by her gender in order to defeat their motion for summary judgment. The Court of Appeals further determined that the issue of Respondents' motivation had not been properly addressed by the District Court or adequately briefed by the parties in

the appeal. Therefore, the Court of Appeals remanded this case to give Petitioner an opportunity to amend her response to Respondents' motion for summary judgment in order to make the necessary showing of improper motive.

The decision of the Court of Appeals that the Petitioner must provide direct evidence of gender-based animus in order to withstand a motion for summary judgment based on qualified immunity is consistent with this Court's view that "qualified immunity questions should be resolved at the earliest possible stage of litigation." *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3042 n.6 (1987). The Court of Appeals has given the Petitioner another opportunity to justify her claims. If she cannot do so, Respondents should not be subjected to the burdens of trial that *Harlow* sought to prevent. In view of the additional opportunities that Petitioner will have to refute Respondents' motion for summary judgment in the District Court, this case does not present the proper factual or procedural framework for this Court to consider this question of federal law.

II. FEDERAL COURTS OF APPEALS HAVE UNIFORMLY HELD, CONSISTENT WITH DECISIONS OF THE SUPREME COURT, THAT A § 1983 PLAINTIFF HAS THE BURDEN OF PRODUCING EVIDENCE SUFFICIENT TO CREATE A GENUINE ISSUE AS TO WHETHER THE DEFENDANT ACTED UNCONSTITUTIONALLY WHEN THE DEFENDANT MOVES FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY.

The Sixth Circuit recognized that under *Harlow, supra*, qualified immunity is an affirmative defense which

must be pleaded by the official. Respondents indisputably did plead qualified immunity as a defense.

Citing its earlier decision in *Dominique v. Telb*, 831 F.2d 673 (6th Cir. 1987), the Court of Appeals ruled that a plaintiff should normally include in his original complaint all of the factual allegations necessary to sustain a conclusion that the defendant violated clearly established law. This ruling is entirely consistent with *Mitchell, supra*, at 526, where the Supreme Court held that "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Implicit in these cases is the principle that a plaintiff has the burden at the pleading stage of setting forth the clearly established law and asserting facts, which if true, show a violation of that law.

The Court below determined that at the time of the acts of which Petitioner complains, the law was clearly established that employment decisions based on gender violate the equal protection clause of the Constitution. Therefore, the only remaining issue in determining whether Respondents violated Petitioner's constitutional rights is whether Respondents' employment decisions were motivated by discriminatory gender-based animus. Respondents do not claim that they "neither knew nor should have known of the relevant legal standard," *Harlow, supra*, at 819, *i.e.*, that employment actions motivated by sexually discriminatory animus violate the equal protection clause.

Since full discovery had already occurred, the Court of Appeals ruled that Petitioner must present direct evidence that the officials' actions were improperly motivated in order to defeat Respondents' motion for summary judgment. This ruling is consistent with the burden placed on the plaintiff in *Mitchell, supra,* where the Supreme Court held that "the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." *Mitchell, supra,* at 526. It is also consistent with the opinions in other Circuits which have addressed the immunity defense in the context of a § 1983 action involving unconstitutional motive. *See Gutierrez, supra; Martin, supra; Wright, supra.*

In accordance with standard principles for deciding a motion for summary judgment, the Court of Appeals directed the District Court to consider all the undisputed evidence produced as a result of discovery, read in the light most favorable to the non-moving party. In light of these directions which are so favorable to Petitioner, it is unnecessary to resolve the question of burdens of proof.

The Court of Appeals Opinion correctly set forth the respective burdens of the parties. The Opinion does not conflict with any decision of this Court or other Circuits on this issue. This case does not present any important unresolved questions which the Supreme Court need address again.

III. WHETHER § 1983 DEFENDANTS ARE REQUIRED TO PLEAD QUALIFIED IMMUNITY WITH SPECIFICITY WHEN THEIR PLEADING HAS PUT THE PLAINTIFF ON NOTICE OF THE DEFENSE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE SUPREME COURT.

Respondents' Amended Answer pleaded that some of the Defendants were immune from personal liability. The liberal rules of notice pleading require nothing more. Petitioner has cited absolutely no authority in the Federal Rules of Civil Procedure or the case law for her contention that the defense of qualified immunity is waived if not pleaded for each particular defendant. The basic defense is the same for all.

Gomez v. Toledo, 446 U.S. 635 (1980) and *Alexander v. Alexander*, 706 F.2d 751 (6th Cir. 1983), cited by the Petitioner, held only that a defendant has the burden of pleading qualified immunity. Respondents have met that burden. Petitioner has identified no authority which requires more specificity at the pleading stage.

In her briefs to the Court of Appeals, Petitioner asserted that all of the Respondents possessed responsibility and policy-making authority with respect to claims of sexual harassment [Appellee's Brief to Court of Appeals, p. 12]. By acknowledging Respondents' discretionary authority, Petitioner thereby provided the basis upon which Respondents are entitled to personal immunity. "[G]overnment officials performing discretionary functions *generally* are shielded from liability for civil damages . . . ." *Harlow, supra*, at 818 [emphasis added].

The Court of Appeals correctly ruled that Respondents' Amended Answer provided Petitioner and the District Court with sufficient notice of Respondents' claim to qualified immunity. Moreover, Petitioner certainly was on actual notice of Respondents' qualified immunity defense after receiving a motion for summary judgment detailing Respondents' position on the issue. The Court of Appeals Opinion is not in conflict with any decision of the Supreme Court or another federal Court of Appeals, and the pleading requirement is not an important question which should be addressed by the Supreme Court.

IV. THE SUPREME COURT HAS CONSISTENTLY PERMITTED § 1983 DEFENDANTS TO MOVE FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY AFTER DISCOVERY HAS OCCURRED.

The law is well established that defendant officials are entitled to raise the immunity defense in a motion for summary judgment. Indeed, several of the most frequently cited cases on immunity came before the lower courts on motions for summary judgment. *See, e.g., Mitchell, supra; Harlow, supra; Scheuer, supra.*

The Sixth Circuit has explicitly recognized the right to move for summary judgment based on personal immunity:

> First, if the pleading itself is insufficient the defendant may file a motion to dismiss and upon denial thereof take an immediate appeal. . . . If the complaint sufficiently alleges actions outside the scope of the official's immunity, the defendant still retains the right to file a motion for summary judgment so that

> the further harassment of going to trial may be avoided. If, however, summary judgment predicated on a claim of immunity is denied it is once more possible to appeal from an adverse ruling on the Rule 56 motion and to obtain a stay of trial pending a resolution of that issue on appeal.

Kennedy v. City of Cleveland, 797 F.2d 297, 299-300 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). *See also Hall v. United States*, 704 F.2d 246 (6th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983). Moreover, in *Kennedy, supra*, the court recognized that defendants are entitled to assert the defense of qualified immunity even during a trial. Thus, the waiver of qualified immunity contemplated in *Kennedy* is a waiver in stages. For instance, a defendant who fails to file a timely motion to dismiss may waive the right to be immune from discovery. However, he clearly does not waive the right to be immune from trial.

The purpose of the immunity defense is to protect defendants from the burdens of litigation. If defendants voluntarily submit to the burdens of discovery, the plaintiff has no basis to complain. Far from being prejudiced, the plaintiff in fact has the opportunity to obtain additional evidence to support her claim. If she cannot do so after discovery, there is all the more reason for granting a defendant immunity and avoidance of trial.

Petitioner has identified no authority which supports her contention that an amended answer and motion for summary judgment on the basis of qualified immunity after discovery represent an inexcusable delay waiving the defense. The Court of Appeals Opinion is consistent with Supreme Court decisions and does not conflict with another Court of Appeals decision.

V. FEDERAL COURTS OF APPEALS HAVE UNIFORMLY HELD THAT A § 1983 PLAINTIFF MUST PRESENT DIRECT EVIDENCE OF UNCONSTITUTIONAL MOTIVE WHEN UNCONSTITUTIONAL MOTIVE IS AN ELEMENT OF THE PLAINTIFF'S CLAIM IN ORDER TO DEFEAT A MOTION FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY AND THESE DECISIONS ARE CONSISTENT WITH SUPREME COURT DECISIONS.

In *Mitchell v. Forsyth,* this Court emphasized that *Harlow* "refashioned the qualified immunity doctrine in such a way as to 'permit the resolution of many insubstantial claims on summary judgment.' " *Mitchell, supra,* at 526 (quoting *Harlow, supra,* at 817-18). The Court has consistently condemned insubstantial suits against public officers and required resolution at the earliest possible stage. *See Anderson,supra,* at 3039 n.2.

It was because of this Court's clear admonitions against insubstantial § 1983 claims proceeding to trial that the District of Columbia Circuit in *Martin, supra,* concluded that a summary judgment standard more demanding of plaintiffs is required when public officer defendants move for summary judgment on the basis of their qualified immunity. *See Martin, supra,* at 1435. As a result, in *Martin,* the court ruled that to avert dismissal a plaintiff must produce some direct evidence of unconstitutional motive when the defendant's subjective intent is an essential component of the plaintiff's claim.

The Court of Appeals panel in this case reached the same conclusion and required Petitioner to present direct evidence of Respondents' improper discriminatory

motive on her equal protection claim. Petitioner has presented no valid reason nor identified any case authority which supports her contention that the requirement for demonstrating unconstitutional motive should differ depending upon the constitutional violation at issue. Many courts have indicated that the role of impermissible motive in a qualified immunity defense is the same, whenever motive is an element of a plaintiff's claim. *See, e.g., Wright, supra* (comparing improper motive in civil rights and First Amendment actions); *Halperin v. Kissinger,* 807 F.2d 180 (D.C. Cir. 1986); *Kenyatta v. Moore,* 744 F.2d 1179 (5th Cir. 1984), *cert. denied,* 471 U.S. 1066 (1985).

Petitioner's reliance on *Watson v. Ft. Worth Bank and Trust,* ___ U.S. ___, 108 S.Ct. 2777 (1988), to support her contention that circumstantial evidence should suffice to prove discriminatory motive is misplaced. In *Watson* this Court concluded that a Title VII plaintiff could introduce statistical evidence to show that subjective employment selection procedures had a disparate impact on minorities or other groups protected by Title VII. The present action does not involve selection procedures. Furthermore, Petitioner has never sought to introduce any evidence whatsoever of statistical disparities between male and female employees of the Department of Finance and Administration.

Petitioner's contention that courts have long permitted circumstantial or inferential evidence to prove subjective discriminatory motive is unsupported by citation to any authority, much less a § 1983 decision involving an equal protection claim.

The Court of Appeals' ruling on the evidence required is consistent with Supreme Court decisions concerning the qualified immunity defense and does not merit review.

VI. FEDERAL COURTS OF APPEALS HAVE CONSISTENTLY HELD THAT SUPERVISORY OFFICIALS WHO DID NOT ACTIVELY PARTICIPATE IN OR AUTHORIZE CONSTITUTIONAL VIOLATIONS ARE NOT PERSONALLY LIABLE FOR ALLEGED CONSTITUTIONAL VIOLATIONS BY AN EMPLOYEE IN A § 1983 ACTION AND THESE DECISIONS ARE NOT IN CONFLICT WITH ANY DECISIONS OF THE SUPREME COURT.

The Sixth Circuit panel rejected Petitioner's sexual harassment claim against Respondents because she did not allege that they actively participated in or authorized any harassment by Henderson. This decision is consistent with the Sixth Circuit's prior decisions in *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984), *cert. denied*, 469 U.S. 845 (1984) and *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1982).

The Sixth Circuit does not stand alone in holding that direct participation by a supervisory official is required to establish liability. Numerous courts have concluded that the doctrine of respondeat superior does not apply in § 1983 actions and that more than mere negligence on the part of a supervisor is necessary to state a claim against him. *See, e.g., Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987); *Henriksen v. Bentley*, 644 F.2d 852 (10th Cir. 1981); *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977). The necessity of showing direct participation is

even more apparent when a claim is based on the equal protection clause for which purposeful discrimination must be shown. *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

There is no evidence in the record that any of the Respondents were aware of any allegations of sexual harassment by Henderson until Petitioner's December 10 letter. Even assuming Respondents were aware of harassment, however, Petitioner has failed to cite a single case which imposes § 1983 liability on supervisors on this basis.

The Court of Appeals separately addressed the subsequent employment actions that Respondents took with respect to Petitioner and what evidence Petitioner must show to establish that those actions constituted an equal protection violation. Petitioner has confused that issue with the separate issue of sexual harassment. The Court of Appeals decision on liability for sexual harassment is consistent with previous decisions of the Sixth Circuit and other Courts of Appeals and is not in conflict with any decision of this Court. This is not an issue which needs to be settled by the Supreme Court.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that there are no special or important reasons for granting a Writ of Certiorari in this case, and respectfully urge this Court to deny the present Petition.

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